Supreme Court, U.S.
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No. 88-594

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1988

FOUR STAR CORPORATION,

Petitioner,

v.

JOHN A. BOTT AND JAC PRODUCTS, INC.,

Respondents.

ON PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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I. QUESTION PRESENTED FOR REVIEW

1. Did the Appeals Court err in affirming the District Court's decision that the limitations contained in and relating to the patent reissue statutes should not be overwritten upon the Congressional Statutes relating to patent continuation practices?

Respondents answer "no" and therefore respectfully submit that the questions presented by the petition do not present any matter that is properly the basis for a writ of certiorari as discussed herein.

LIST OF ALL PARTIES

All parties appear in the caption of the case in the Court.

The Petitioner Corporation, Four Star Corporation, has no parent companies, subsidiaries, or affiliates of the corporation.

The respondent John A. Bott is an individual.

The respondent Corporation, Jac Products, Inc., has only one publicly held affiliate, namely, Hoover Universal, Inc.

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35 U.S.C. §120

35 U.S.C. §251

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CITATIONS TO OPINIONS BELOW

Bott v. Four Star, 675 F.Supp. 1069, 3 USPQ2d 1652 (D.C.E.D.Mich., Feb. 23, 1987) denying petitioner/defendant's Motion for Summary Judgment on equitable estoppel defense. A 5-22.*

Unpublished Memorandum Opinion of the Trial Court dated September 2, 1987, granting plaintiffs/respondents' motion for Summary Judgment on remaining liability issues regarding patent infringement by petitioner (Bott v. Four Star, Civil Action No. 86-CV-70176). A 23-26.

Unpublished liability decision of the Trial Court dated September 16, 1987 (Bott v.

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*All references to Appendix are to Petitioner's printed appendix, and designated "A [page]".

Four Star, Civil Action No. 86-CV-70176. A 27-32.

Unpublished Trial Court decision dated November 13, 1987 adjudging petitioner/defendant liable for patent infringement and awarding injunctive relief to plaintiffs/respondents (Bott v. Four Star, Civil Action No. 86-CV-70176-DT, Eastern Dist. of Mich., Southern Division). A 33-35.

Unpublished decision by the Trial Court dated December 9, 1987 awarding damages to plaintiffs/respondents (Bott v. Four Star, Civil Action No. 86-CV-70176, Eastern Dist. of Mich., Southern Division). A 36-43.

Unpublished Appellate decision dated May 26, 1988 affirming both of the above decisions of the trial court (Bott v. Four Star, Appeal Nos. 88-1117, 1118, Ct. of Appeals for the Federal Circuit). A 44-49.

Unpublished Appellate decision dated August 26, 1988 affirming the damage award (Bott v. Four Star, Appeal No. 88-1278, Court of Appeals for the Federal Circuit). A 1-4.

JURISDICTIONAL STATEMENT

Petitioner seeks a writ of certiorari for this Court to review the judgment of the United States Court of Appeals for the Federal Circuit dated August 26, 1988 (Appeal No. 88-1278). The Court of Appeals affirmed the decision of the trial court below awarding monetary damages to respondents/plaintiffs.

The case had original jurisdiction in the Federal District for the Eastern District of Michigan under 28 U.S.C. § 1338(a) as it arose under an Act of Congress relating to patents, namely the patent infringement statutes.

Jurisdiction for the appeal was in the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. Section 1295.

Jurisdiction to review judgments of the United States Court of Appeals for the Federal Circuit by writ of certiorari is conferred upon this Court by 28 U.S.C. Section 1254 (1). As grounds for the issuance of the writ, petitioner claims that the Appellate Court

decision "decided an important question of federal law which has not been, but should be, settled by this Court".

No important question of federal law is at issue that requires resolution by this Court. Although this Court certainly has the power to issue a writ of certiorari to review the above-cited decision, Respondent respectfully disagrees with Petitioner as to the appropriateness of a writ for this case.

RELEVANT STATUTORY SECTIONS

35 U.S.C. §120 - Benefit of Earlier Filing Date in the United States

An application for patent for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in an application previously filed in the United States, or as provided by section 363 of this title, by the same inventor shall have the same effect, as to such invention, as though filed on the date of the prior application, if filed before the patenting or abandonment of or termination of proceedings on the first application or on an application similarly entitled to the benefit of the filing date of the first application and if it contains or is amended to contain a specific reference to the earlier filed application.

35 U.S.C. §251 - Reissue of Defective Patents

Whenever any patent is, through error without any deceptive intention, deemed wholly or partly inoperative or invalid, by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than he had a right to claim in the patent, the Commissioner shall, on the surrender of such patent and the payment of the fee required by law, reissue the patent for the invention disclosed in the original patent, and in accordance with a new and amended application, for the unexpired part of the term of the original patent. No new matter shall be introduced into the application for reissue.

The Commissioner may issue several reissued patents for distinct and separate parts of the thing patented, upon demand of the applicant, and upon payment of the required fee for a reissue for each of such reissued patents.

The provisions of this title relating to applications for patent shall be applicable to applications for reissue of a patent, except that application for reissue may be made and sworn to by the assignee of the entire interest if the application does not seek to enlarge the scope of the claims of the original patent.

No reissued patent shall be granted enlarging the scope of the claims of the original patent unless applied for within two years from the grant of the original patent.

35 U.S.C. §252 - Effect of Reissue

The surrender of the original patent shall take effect upon the issue of the reissued patent, and every reissued patent shall have the same effect and operation in law, on the trial of actions for causes thereafter arising, as if the same had been originally granted in such amended form, but in so far as the claims of the original and

reissued patents are identical, such surrender shall not affect any action then pending nor abate any cause of action then existing, and the reissued patent, to the extent that its claims are identical with the original patent, shall constitute a continuation thereof and have effect continuously from the date of the original patent.

No reissued patent shall abridge or affect the right of any person or his successors in business who made, purchased or used prior to the grant of a reissue anything patented by the reissued patent, to continue the use of, or to sell to others to be used or sold, the specific thing so made, purchased or used, unless the making, using or selling of such thing infringes a valid claim of the reissued patent which was in the original patent. The court before which such matter is in question may provide for the continued manufacture, use or sale of the thing made, purchased or used as specified, or for the

manufacture, use or sale of which substantial preparation was made before the grant of the reissue, and it may also provide for the continued practice of any process patented by the reissue, practiced, or for the practice of which substantial preparation was made, prior to the grant of the reissue, to the extent and under such terms as the court deems equitable for the protection of investments made or business commenced before the grant of the reissue.

STATEMENT OF THE CASE

Respondent/plaintiff John A. Bott (hereinafter "Bott") is an inventor of automotive products and holds several patents including the one petitioner/defendant Four Star Corporation (hereinafter "Four Star") has been found to infringe. Respondent/plaintiff Jac Products is the exclusive licensee of Bott's patents and as licensee manufactures luggage racks for the automobile industry such as those described in the patent in suit.

Petitioner/defendant Four Star manufactures and sells automobile parts including the luggage rack that has been held to infringe the Bott patent in issue in this case. Four Star has previously been found to infringe other Bott patents relating to luggage racks.

As stated by the petitioner, a detailed rendition of the pre-appellate factual background to this litigation is set forth in the trial court's decision on the equitable

estoppel issue, Bott v. Four Star, 675 F.Supp. 1069, 3 U.S.P.Q.2d (E.D.Mich. 1987). (A 5-22). A concise history is set forth in the initial paragraphs of the opinion of the Court of Appeals for the Federal Circuit (hereinafter "CAFC" or "Federal Circuit") in Bott v. Four Star Corp., Appeals Nos. 88-1117, 1118, Court of Appeals for the Federal Circuit (A 39-44).

Respondents cannot do better in summation of the background than the Court of Appeals did itself and hence quotes the relevant portion from the decision below.

> "This appeal is another episode in the long history of litigation between the same parties and the same court over patents involving luggage racks for automobiles. Many of the pertinent facts are set forth in this court's recent decision in Bott v. Four Star Corp., Nos. 88-1117 and 88-1118 (Fed.Cir. May 26, 1988) (unpublished). As the court there found, judgment was entered in favor of Bott against Four Star for the infringement of Bott's patents '658 and '471 covering removable automobile luggage racks. In 1983, Four Star altered the design of its luggage

> rack to avoid infringement of the '658 and '471 patents by developing a nonremovable rack which Four Star began selling in June 1984.
>
> The patent involved in this appeal is U.S. Patent No. 4,516,710 ('710). In May 1985, Bott's '710 patent issued and contained claims that were broad enough to encompass Four Star's redesigned racks. The '710 patent resulted from an application filed in November 1983. It was the seventh in a series of continuation applications, all of which were based on the identical disclosure and relied for priority on an application filed in 1974. The applications on which the '658 and '471 patents issued were part of the string of continuations.
>
> The only issue on this appeal is raised by Four Star's contention that equity requires that the doctrine of intervening rights, invoked by the courts prior to enactment of 35 U.S.C. §252 (1982) and thereafter codified in that statute, should be applied in this case to protect the intervening rights of Four Star against liability for the infringement of Bott's '710 patent." A 3.

Simply put, the Court of Appeals did not find petitioner's argument, paraphrased above, sufficiently distinct from, or any more persuasive than, the related argument presented to that same court three months

earlier. The CAFC once again affirmed the lower court based upon the law of the case doctrine and the current petition for a writ of certiorari resulted.

Petitioner is calling for this Court's review of two decisions in fact. The CAFC decided Appeal No. 1278 (for which the writ of certiorari is sought) on the law of the case doctrine based upon the decision of Appeals No. 88-1117, 1118. Petitioner alleges error in both.

In the first appeal, Bott v. Four Star, Appeals No. 88-1117, 1118 (decision found at A 39-44) petitioner challenged the enforceability of respondent's '710 patent based upon equitable arguments structured upon considerations found in the patent reissue statute, 35 U.S.C. Section 251 (1982). Petitioner would have had the CAFC read the reissue statutes into the statutes relating to continuation patents such as the patent in suit. Petitioner was forced to cast its

argument in terms of equitable considerations stemming from the reissue statute because the reissue statute itself is simply not applicable. The patent sought to be enforced was not a reissue patent. The patent in suit was the result of what is known as a continuation application governed by 35 U.S.C. Section 120 (Supp.III 1985). The Appeals Court properly found that patent continuation practice was a part of a separate statutory scheme from patent reissue practice. The trial court was therefore affirmed in all aspects and the case remanded to the trial court for an accounting.

The second appeal in this case resulted from the accounting proceedings with petitioner Four Star now making the argument that the doctrine of intervening rights, 35 U.S.C. Section 252 (1982) (also part of patent reissue law) should be read into continuation practice.

The Court of Appeals applied the law of the case doctrine relying upon its decision in the previous appeal, Appeals No. 88-1117, 1118 (discussed immediately supra). The Court of Appeals again refused Four Star's invitation to overlay Congress' statutory scheme for reissue patents upon patents resulting from continuation practice. The Appeals Court in applying the law of the case doctrine quoted the applicable holding from the previous decision:

> "We are not persuaded by Four Star's position because these Supreme Court cases preceded the enactment of the Patent Act of 1952 (Title 35 of the United States Code). Continuation applications are authorized by 35 U.S.C. §120 (Supp. III 1985). Section 120 does not contain any time limit on broadened claims similar to the two-year time limit applicable to reissue proceedings under 35 U.S.C. §251 (1982). The latter section expressly provides that a reissued patent shall not be granted enlarging the scope of the claims of a patent unless it is applied for within two years of the grant of the original patent. Had the legislature intended any such time limit to apply to continuation

> applications it could have included a similar provision in section 120. Moreover, we have not been directed to anything in the legislative history of the 1952 Act that supports Four Star's contention that the equitable considerations discussed in the Supreme Court cases relied on by Four Star should have continued viability." (A 4).

Thus, Petitioner/defendant Four Star's argument upon the second appeal was not distinguishable from the argument presented in the first appeal. Both appeals were based on Petitioner/defendant's attempts to rewrite one of the patent statutes.

Called upon to interpret one facet of the patent code in light of a separate section of the patent code, the Court of Appeals, in the first appeal, properly engaged in statutory interpretation. Comparing the two distinct sections of the patent statutes, the Court of Appeals clearly recognized that the two sections are not properly compared.

> "Section 120 does not contain any time limit on broadened claims similar to the two-year time limit applicable to reissue proceedings

> under 35 U.S.C. Section 251 (1982)." Bott, 88-1117, 1118 (A 46).

The CAFC drew the inescapable conclusion:

> "Had the legislature intended any such time limit to apply to continuation applications it could have included a similar provision in section 120." Ibid.

As part of the Court of Appeals continuing analysis of the statutory sections, the court turned to the legislative history:

> "Moreover, we have not been directed to anything in the legislative history of the 1952 Act that supports Four Star's contention that the equitable considerations discussed in the Supreme Court cases relied on by Four Star should have continued viability." (A 47).

The Court of Appeals concluded its statutory interpretation with:

> "Accordingly, we are not persuaded by Four Star's argument that this court should adopt equitable safeguards to limit continuation applications when the Congress gave no indication that it intended to do so." Ibid.

The Court of Appeals found this holding consistent with previous holdings of one of its predecessor courts, the Court of Customs

and Patent Appeals,* wherein no temporal limits upon continuation applications were found. In Re Hogan, 559 F.2d 595, 604, n. 13, 194 U.S.P.Q. 527, 536, n. 13 (C.C.P.A. 1977); In Re Henriksen, 399 F.2d 253, 262, 158 U.S.P.Q. 224, 231 (C.C.P.A. 1968). The Court in In Re Hogan specifically states that a limit upon continuation applications is a matter of policy for the Congress.

It was this same analysis that was called into play when petitioner/defendant Four Star appealed the case in Appeal No. 1278 (from which the current petition arose). Again Four Star requested reading limitations of the reissue statutes onto the sections of the patent act dealing with continuation practice. The Court of Appeals felt no need to repeat

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*In South Corp. v. United States, 690 F.2d 1368 (Fed.Cir. 1982), the newly created CAFC adopted as precedent the holdings of its predecessor courts, both the Court of Claims and the Court of Customs and Patent Appeals.

the very analysis it had gone through for the parties three months earlier. The CAFC merely invoked the law of the case doctrine and quoted a portion of its previous opinion without new or continued analysis.

Petitioner/defendant seeks to have the later CAFC decision reviewed via the petition for a writ of certiorari. Necessarily implicated is the prior appeals court decision of Bott Appeals No. 88-1117, 1118 decided May 26, 1988, wherein the holding was made that became law of the case. From Petitioner's petition:

> "It is petitioner's position that both appellate decisions are erroneous in a number of respects".

The writ of certiorari is requested due to what petitioner alleges is an important question of federal law which has not been, but should be, settled by this Court.

In the three questions presented by petitioner for review, petitioner/defendant yet again seeks to have the limitations of

patent reissue statutes read into the patent continuation statutes despite two hearings in the District Court and two decisions in the Court of Appeals for the Federal Circuit, all of which found petitioner/defendant's arguments meritless. The requested writ should be denied because the appellate court decisions are based upon sound interpretation of the controlling statutes and are fully consonant with prior appellate decisions. As conceded by petitioner/respondent and stated by the appeals court, the only proper avenue of relief open is via Congress and legislation, not this Court and a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. Petitioner's Rationale for a Writ of Certiorari Shows a Misunderstanding of the Appellate Decision

As Rule 17 of the rules of this Court state, a writ of certiorari "is not a matter of right, but of judicial discretion." Petitioner/defendant has apparently relied upon Supreme Court Rule 17.1(c) stating that the Court of Appeals for the Federal Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court." Petitioner/defendant has not, and under the facts of the litigation so far could not, invoke any other consideration of Rule 17.

Petitioner's three questions presented for review can be reduced to one underlying question: Did the CAFC err by not rewriting the patent continuation statute to include limitations found in a different section of

the patent statute. Petitioner's first question presented for review, dealing with application of law of the case doctrine, shows petitioner's inability to grasp the thrust of the CAFC's opinions. Petitioner argues at page 9 of its printed petition:

> "It was error for the Appellate Court to invoke the law of the case doctrine in the second decision since the issues involved in the two appeals were clearly different: the first appeal involved putting a two-year limit on patents containing broadened claims which result from continuation practice; the second appeal concerning the applicability of the doctrine of intervening rights in a continuation situation when fashioning a remedy for patent infringement."

Petitioner practices a sleight of hand by its presentation of the issues involved. Put in more <u>complete</u> and parallel form:

> The first appeal involved putting the two-year limit taken from the patent reissue sections of the code on patents which result from continuation practice;
> the second appeal involved putting the doctrine of intervening rights taken from the patent reissue sections of the code on patents

> which result from a continuation practice.

Once those elements, omitted by petitioner, are added to make the comparison parallel, the applicability of the law of the case is apparent: both appeals involved attempts to read Congress' patent reissue scheme on Congress' patent continuation scheme. Finding no basis for such judicial legislation, the CAFC affirmed the trial court on both occasions.

This one issue of rewriting the patent statutes is not an important question of federal law meriting a writ of certiorari. Even a cursory review of the two appellate decisions below reveals that not only do the two decisions not involve an important question of federal law but that petitioner is in fact seeking a change that can only be made by the Congress and should not be made by this Court.

II. The Appeals Court Has Not Decided An Important Question of Federal Law Requiring Intervention By This Court

This case is not worthy of this Court's attention. Petitioner now seeks to extend its delaying tactics by seeking a review of its theory in this Court alleging the issue be one of an "important" question of federal law. The Court of Appeals found nothing new in the second appeal and decided it upon law of the case doctrine. Petitioner/defendant, having been found guilty yet again of infringing upon respondent's patent rights, has already had two bites at the apple of appealing on its arguments directed to the non-applicable reissue law.

The CAFC did not consider its decisions as deciding an important question of federal law.

The patent appeals court, the CAFC, prefaced* both of the underlying decisions with:

> "Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically."

While this notation is not dispositive, it is certainly indicative of the lack of importance of the decision petitioner wishes this Court to review. A case so insignificant does not involve an important question of federal law. It is submitted that if the appeals court charged with promoting uniformity and clarity in the United States patent law feels its

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*Petitioner inaccurately reproduces both Court of Appeals decisions by putting this note as a footnote. The Court of Appeals prominently places the Note before even the title of the Court itself. An accurate reproduction of the Court's opinion would have the note placed at the top of A 2 and A 45.

decision ". . . does not add significantly to the body of law and is not of widespread legal interest", it does not rise to the level of concern meriting a writ of certiorari.

Indeed, the lack of precedential weight for the decisions indicate they are of importance only to the parties involved. The lack of precedent on point also indicates the specific issue is only of importance to the parties of this case. The decision being of importance only to the parties, and not the public, a writ is unwarranted. As stated by this Court in dismissing an improvidently granted writ of certiorari:

> ". . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . ." Layne & Bowler Corp. v. Western Well Works, Inc., 261 US 387, 393, 43 S.Ct. 422, 67 L.Ed. 712 (1923).

The decision does not rise to the level of importance meriting review via a writ of certiorari.

III. The Decision Sought To Be Appealed Worked No Change in Settled Law With No Resultant Uncertainty in The Patent System

Petitioner/defendant twice failed to persuade the appellate court to rewrite the patent laws. In so doing, the appeals court specifically avoided working any change in existing law. In fact, the court cited two earlier decisions of its predecessor court to illustrate of the harmony of its decisions with existing precedent. As long as procedures for continuation practice were followed any issuing patents were valid and enforceable. In Re Hogan, 559 F.2d at 604, and In Re Henrickson, 399 F.2d at 262 (cited by the CAFC in the May 26, 1988 opinion). The patent continuation practice contains its own safeguards, both legislative and judicial

(which have been complied with in the case) to protect accused infringers. The existence of these precedents for 11 and 20 years respectively reflects a well settled question in a working patent system. The CAFC decisions do not introduce any uncertainty into the law but rather adds some measure of judicial certainty by applying decisions of its predecessor courts to an isolated fact situation. Therefore, Petitioner's strident claims of a system needing urgent relief ring hollow.

Petitioner/defendant cannot deny that the system is functioning smoothly with respect to patent continuation practice. Thus, Congress' policy decision of adopting certain safeguards for continuation practice and other safeguards for reissue practice was a wise one. The "uncertainty" mentioned by petitioner on page 9 of its petition is not uncertainty in the legal system, for indeed all <u>four</u> decisions below in this case were uniform. There is no

uncertainty in the system, much less any caused by the CAFC's decisions. Rather, any uncertainty is one that is always present in business, i.e., will a patent that covers the product issue to a competitor. That uncertainty will remain even if petitioner were to have the relief requested. Petitioner's argument that this issue is of widespread concern to and effect on both the patent system and the public is erroneous. The case at bar is truly one solely involving the parties.

IV. Legislative, Not Judicial, Relief Is Being Requested

Petitioner is requesting via a writ of certiorari a judicial rewriting of congressional statutes covering patent continuation practice so as to include limits from a different statutory scheme. In two appeals involving this very issue, the Court of Appeals for the Federal Circuit, the court

steeped in experience with patent law, found such a reading of the statute clearly unwarranted and without any basis in legislative intent. Petitioner requests nothing less than judicially established patent policy by judicial rewriting of the patent statutes.

When petitioner, in closing its brief (page 58 of photocopy brief, page 27, printed brief) states: "The C.A.F.C. refused two opportunities to take action on the grounds that the matter was really best left to Congress," it reveals why certiorari is inappropriate. Petitioner/defendant has had four judicial testings of its theory (two at district court level, two at the CAFC). Both the district court and the CAFC decisions show that an act of Congress is necessary to rewrite the statute to reflect petitioner's view.

Petitioner on that same page first attempts to taunt this Court to action by

talking of issues "ducked". Failing that, petitioner laments of Congress' supposed sluggishness. Either exortation illustrates the lack of a basis for a writ of certiorari, namely, that the analysis of the statutes relating to continuation procedure was correct and any change can be fashioned only by Congressional action not judicial review.

CONCLUSION

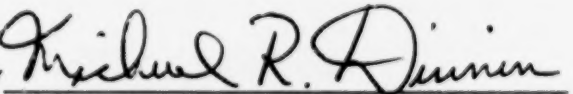
No federal question of great importance requiring intervention by this Court is involved here. It is merely a dispute between the two parties. Petitioner has had more than one day in court and been found to infringe respondent's patent. The Court of Appeals has twice heard the appeal here at issue and found it to be without merit. Petitioner claims the decision to be one of great import, and goes so far as to predict dire consequences for the patent system and even the Republic. Yet the decisions complained of were found by the C.A.F.C. to not add significantly to the body of law, not be of widespread legal interest, and, in fact, not be citable as precedent. Such unpublished, nonprecedential decisions are not the "important questions of federal law" meriting a writ of certiorari. Petitioner's complaint is not about a flawed legal decision but about what it perceives as a flawed legislative decision. As reflected

by petitioner's closing words in its petition, it is a change in the statute and the policy that is sought via a writ of certiorari. The separation of powers written into our constitutional system leaves that decision to Congress alone.

The petition should be summarily denied.

Respectfully submitted,

HARNESS, DICKEY & PIERCE

By 

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Date: October 31, 1988

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CERTIFICATE OF SERVICE

It is hereby certified that the following:

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

has been served upon Petitioner this 31st day of October, 1988, by causing three copies of said foregoing material to be mailed, first class, postage prepaid to:

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